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AUG 19 2004

Federal Communications Commission
Office of Secretary

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ORIGINAL

August 19, 2004

REDACTED VERSION FOR PUBLIC INSPECTION

Via Hand Delivery

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: *Ex Parte* Presentation in CC Docket Nos. 01-338, 96-98, and 98-147

Dear Ms. Dortch:

NuVox Communications ("NuVox"), through its attorney, files this letter pursuant to Section 0.459 of the Federal Communications Commission's ("Commission's") rules and regulations in support of its request for confidential treatment of certain portions of the attached written *ex parte* letter ("Letter") in the above-captioned matters. 47 C.F.R. § 0.459.

NuVox requests confidential treatment of sensitive business information, which is identified by the redacted notations in this Letter. The information identified for redaction falls within Exemption 4 of the Freedom of Information Act, 5 USC §552(b).

Pursuant to Section 1.1206(b)(1) of the Commission's rules, a cover letter and six copies of the confidential version of this presentation and a cover letter with six redacted copies of the public version are being filed with the Office of the Secretary. Should you have questions or require additional information, please contact the undersigned.

Very truly yours,

Michael H. Pryor
Counsel to NuVox Communications, Inc.

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Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: CC Docket Nos. 96-98, 98-147, 01-338

Dear Ms. Dortch:

By and through its counsel, NuVox Communications ("NuVox")[1/] writes to reiterate its support for proposals to ensure continued access to DS1 loops and DS1 EELs on an interim basis,[2/] and to respond to recent Verizon's *ex parte* submissions purporting to present evidence that carriers are not impaired without access to DS1 facilities, and claiming that the D.C. Circuit vacated the FCC's local loop rules.[3/] Specifically, NuVox

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1/ NuVox recently concluded a merger with NewSouth Communications.

2/ *See e.g.*, Letter from Michael H. Pryor, counsel to NuVox Communications, to Marlene H. Dortch, Secretary of the Federal Communications Commission ("FCC" or Commission"), CC Docket No. 01-338 (July 23, 2004) ("NuVox *Ex Parte*"); Letter from Russell Frisby, CEO of Comptel/Ascent to the Honorable Michael K. Powell, Chairman of the FCC, CC Docket Nos. 01-338, 96-98 and 98-147 (July 9, 2004) ("Comptel July 9 *Ex Parte*"); Letter from Cbeyond Communications, Covad Communications, GlobalCom, Integra Telecom, Mpower Communications, New Edge Networks and TDS Metrocom, to Michael K. Powell, Chairman of the FCC, CC Dockets Nos. 96-98, 98-147 and 01-338 (July 21, 2004).

3/ Letter from Michael Glover, Senior Vice-President and Deputy General Counsel of Verizon Communications Corp. ("Verizon"), to Marlene H Dortch, Secretary of the FCC, 01-338, 96-98, and 98-147 (July 2, 2004) ("Verizon July 2 Ex Parte"); Letter from Michael Glover, Senior Vice-President and Deputy General Counsel to Verizon, to Michael K. Powell, Chairman of the Federal Communications Commission, CC Docket Nos. 01-338; 96-98; 98-147 (July 19, 2004) filed in) ("Verizon July 19 *Ex Parte*").

proposes that DS1 loops and DS1 EELs[4/] remain available as unbundled network elements pending the adoption of final rules in this proceeding. This proposal provides protection for these discrete network elements if there is a gap between the expiration of the six month "standstill" that NuVox understands the Commission has under consideration and the time when the Commission adopts new UNE rules on remand from the court's decision in *USTA v. FCC,* 359 F.3d 554 (D.C. Cir. 2004) (*USTA II*).

There is ample legal basis to justify this interim relief. As explained below, the Commission has considerable discretion to craft interim relief to avoid market disruption. In the case of DS1 loops and EELs, interim relief is warranted given the specific and unequivocal findings of impairment for such facilities adopted by all five Commissioners. Given the strength and clarity of the Commission's impairment finding, there is every likelihood that the Commission will once again find impairment for DS1 loops and EELs, and there is little likelihood that maintaining DS1 access would result in unbundling where there is no impairment during any interim period before final rules are adopted. Nothing in *USTA II* precludes the Commission from relying on its previous impairment finding for DS1 loops, particularly since the Court nowhere addresses or impugns the Commission's impairment analysis for DS1 capacity loops. Moreover, as explained herein, the Commission's impairment finding is fully applicable to DS1 EELs.

Verizon's recent submissions in no way undermine the Commission's DS1 impairment findings. Nor do Verizon's submissions preclude adoption of a sustainable interim rule preserving DS1 loop and EEL access predicated on those findings and the substantial financial dislocation that will occur if impaired carriers are forced to rely on high priced special access services. The centerpiece of Verizon's advocacy is that carriers can compete using special access services. As was demonstrated in the *TRO* record, and as confirmed herein, special access services are not a viable substitute for DS1 loops and EELs used to provide service to small and medium size business customers. Verizon provides no evidence to conclude otherwise with respect to these facilities.

A. The Commission Has Ample Discretion to Craft An Interim Rule to Preserve Access To DS1 Loops and EELs Pending the Adoption of Final Rules

The Commission has ample authority to establish an interim regime to preserve access to DS1 loops and EELs. The Commission, for example, has repeatedly relied on its authority under sections 201 and 4(i) to adopt interim rules as it finds necessary in the public interest to preserve important interests pending the resolution of broader rulemakings. *See e.g., ISP Remand Order*, 16 FCC Rcd.9151, ¶¶ 77-88 (2001) (establishing interim ISP rate regime pending resolution of broader intercarrier compensation issue); *Local Competition Order*, 11 FCC Rcd.15499, ¶ 726 (1996) (subsequent history omitted) (requiring purchasers of unbundled local switching to pay non-cost-based rates for interim period), *aff'd Competitive Telecommunications*

4/ A DS1 EEL is DS1 loop and DS1 transport combined to form a single, long loop used to provide service to single end user customer, typically a small or medium-sized business.

Association v. FCC 117 F.3d 1068, 1073-74 (8th Cir. 1997); *Supplemental Order Clarification*, 15 FCC Rcd. 9587, ¶ 7, 18 (2000) (establishing interim restrictions on use of EELs), *petition for review denied, Competitive Telecomms. Ass'n v. FCC*, 309 F.3d 8 (D.C. Cir. 2002).[5/]

The Courts afford agencies substantial and broad deference when crafting interim relief. As noted by *MCI Telecomms. Corp. v. FCC*, 750 F.2d 135, 140 (D.C. Cir. 1984), "[s]ubstantial deference must be accorded an agency when it acts to maintain the status quo so that the objectives of a pending rulemaking proceeding will not be frustrated." *See also Competitive Telecomms. Association v. FCC*, 117 F.3d 1068 (8th Cir. 1997) (upholding interim rule imposing not-cost based charges on unbundled switching pending conclusion of universal rulemaking); *Competitive Telecomms. Assoc. v. FCC*, 309 F.3d 8 (D.C. Cir. 2002) (stating that "[a]voidance of market disruption pending broader reforms is, of course, a standard and accepted justification for a temporary rule" and upholding interim restrictions on use of EELs).

The Commission's authority readily extends to the re-adoption on an interim basis of rules previously vacated where, in the Commission's broad discretion, it determines that continuation of the rules is necessary to prevent market disruption. *Capital Cities v. FCC*, 29 F.3d 309, 316 (7th Cir. 1994) ("The precise timetable on which the Commission executes a major turn in regulatory policy is a matter of judgment and prudence rather than logic and measurement, and it is confided to the discretion of the Commission within broad limits here exceeded")(reinstituting on an interim bases certain regulations the Court previously vacated).

Maintaining cost-based access to DS1 loops and EELs pending adoption of new UNE rules is in the public interest because it furthers the1996 Telecommunications Act's goal of promoting facilities-based competition, prevents substantial harm and dislocation of facilities-based carriers, and preserves competition for small business consumers. As demonstrated in a study recently submitted to the Commission, elimination of cost-based access to DS1 facilities would increase aggregate CLEC costs by $2 billion, would increase costs to the nation's small business customers by 25 percent, and would result in an overall decrease in consumer welfare of $4.9 billion annually.[6/] The study concluded that elimination of DS1 loop and EEL unbundling could threaten the continued viability of facilities-based competitive carriers.[7/] The industry-wide conclusions reached in the MiCRA study are confirmed by specific evidence of the economic effects to NuVox of losing DS1 access that is presented herein.

[5/] SBC Communications ("SBC") has previously cited these and other sources to point out that the Commission has the authority to establish interim rates for network elements in the absence of an unbundling requirement. *See*, e.g., SBC *Ex Parte*, CC Docket 01-338 (Dec. 19, 2002).

[6/] The Economic Impact of Elimination of DS-1 Loops and Transport as Unbundled Network Elements, Mark T. Bryant & Michael D. Pelcovits, Microeconomic Consulting & Research Associates (MiCRA), June 29, 2004, attached to Comptel July 9 Ex Parte.

[7/] *Id.*

B. The Commission's Definitive and Unqualified Impairment Finding for DS1 Loops Justifies Continued Access to DS1 Loops and EELs Pending the Adoption of Final Rules

The FCC made qualitatively different impairment findings for DS1 loops based on an overwhelming record demonstrating the infeasibility of self-deployment and the lack of available alternatives, findings that are in no way impeached by the *USTA II* decision. The *Triennial Review Order*[8/] record overwhelmingly demonstrates that facilities-based carriers are impaired without access to DS1 loops. Specifically, all five commissioners found, based on a thorough review of the record, that it is "economically infeasible for competitive LECs to self-deploy DS1 loops" to the small business customers served by such facilities. *TRO* ¶ 325. This finding was based on the substantially smaller revenue opportunities, and higher potential for churn, from small business customers.[9/] The Commission noted that the only evidence of self-provisioned DS1 capacity occurred where a carrier was already self-provisioning OCn or multiple DS3 capacity loops to a location. The Commission concluded that the evidence of OCn level deployment "does not support the ability of carriers to self-deploy stand-alone DS1 capacity loops nor does it impact our impairment finding."[10/]

The Commission further found "scant evidence" of wholesale alternatives to the ILECs' DS1 loops. *TRO* ¶ 325. Moreover, the Commission found that even those carriers that have deployed their own loop facilities lacked the back office systems necessary to support offering any excess capacity on a wholesale basis.[11/] These findings rendered the BOCs' purported factual showings of the extent of fiber deployment irrelevant to the DS1 impairment finding because carriers cannot economically and do not deploy fiber to a small business customer's premises simply to offer DS1-level services. (For the same reason, as discussed further below, Verizon's July 2 *Ex Parte* submission purporting to again show the extent of competing carrier fiber deployment adds no new evidence informing the question of DS1 loop impairment.)

The qualitative difference between DS1 loops and higher capacity facilities was even recognized by the ILECs. *TRO* ¶ 325 (citing SBC Initial Comments at 101; SBC Reply Comments at 156 (proposing DS1 carve out)). This distinction is based on the fact, recognized by the Commission, that DS1 loops are much closer, for impairment

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8/ *Review of the Section 251 Unbundling Obligations for Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability,* 18 FCC Rcd.16978, (2003) ("*Triennial Review Order*" or "*TRO*"), *vacated and remanded in part on other grounds by U.S. Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*").

9/ The Commission thus recognized the "dependency that smaller business customers and their carriers have on DS1 capacity loops." *TRO* n.961.

10/ *TRO* n.957.

11/ *TRO* n.958.

analysis purposes, to a single voice grade line than to a DS3 or OC-n level loop.[12/] In short, unlike the Commission's impairment findings for transport, or for higher capacity loops, there simply was no evidence in the record that carriers could self-deploy DS1 loops, that carriers had in fact self-deployed DS1 loops, or that non-ILEC wholesalers made DS1 loops available.

The strong and overwhelming record on impairment makes it unlikely that interim rules requiring continued DS1 UNE access would result in unbundling obligations where there is no impairment. Conversely, a rule resulting in the automatic imposition of special access rates for new customers should the Commission not conclude its rulemaking within six months would, in the vast majority if not all cases, deprive carriers of TELRIC-based rates even though there is impairment.

C. The Impairment Analysis for DS1 Loops Applies Equally to DS1 EELs

The rationale for retaining access to unbundled DS1 loops just described applies equally to DS1 transport when used as a component of a DS1 EEL. CLECs must recover the cost of a DS1 EELs from a single small business end user just as they must recover the cost of a stand-alone DS1 loop from a single end user. As with DS1 loops, the revenue opportunity from such customers makes it economically infeasible to self-deploy DS1 EELs. The impairment dynamic for DS1 EELs is thus qualitatively different than for high capacity transport and is identical to that for DS1 loops. *Compare TRO* ¶ 371, n.1133 (noting economic characteristics of transport are different than for loops because, for transport, the carrier is not dependent on revenue from single customer).

Cost-based access to the DS1 transport component of the EEL is critical because the price discrepancy between special access services and TELRIC-based rates is most pronounced in the transport leg. NewSouth previously demonstrated this fact to the Commission, pointing to examples from BellSouth's tariffs showing that, whereas DS1 EEL mileage rates ranged from $3.60 to $5.80 per mile, the special access mileage rate, even under discounted term plans, was $105.00 per mile.[13/] In section F of this letter, NuVox provides further analysis confirming this point. The cost increase from just the transport component of the circuit would be prohibitive. For this reason, although the *TRO's* commingling rules permit a carrier to combine a DS1 loop with special access transport, the substantial price increase in the transport component under special access greatly limits the practical use of a commingled EEL.

Maintaining access to DS1 EELs clearly promotes the public interest. The Commission expressly recognized the substantial benefits for facilities-based competition provided by access to EELs. The Commission found that EELs not only "facilitate the growth of facilities-based competition" but that they also foster and promote innovation.

12/ *TRO* n.963 (noting that a DS1 is equivalent to 24 voice grade lines). A DS3 is equivalent to 672 voice grade lines. The lowest level optical loop, an OC-3, is the equal to 3 DS3s, or 2016 voice grade lines.

13/ NewSouth *Ex Parte*, CC Dockets 01-338 and 96-98 (Oct. 3, 2002).

TRO ¶ 576. EELs do so by enabling carriers to expand their geographic coverage without having to incur unnecessarily the cost of collocation. For example, through the use of EELs, NuVox can expand its market from the 281 sites in which it is currently collocated to more than 1500 ILEC wire centers.[14/]

Finally, it is important to note that the Commission's restrictions on the use of EELs would continue to apply. Depending on a carrier's change-of-law language in its interconnection agreement, these restrictions may either be the usage-based restrictions under the *Supplemental Order Clarification* or the architectural-based restrictions adopted, and affirmed, in the *TRO*.

D. *USTA II* Did Not Vacate the Commission's DS1 Analysis

Repeated ILEC protestations to the contrary, *USTA II* did not vacate the rules requiring unbundling of local loops. Verizon and other incumbents take the position that the Court's vacatur of dedicated transport necessarily extends to high capacity loops, including DS1 loops. No such implicit holding can be discerned from the Court's discussion of transport. In each and every instance in which the Court addressed the Commission's determinations with the respect to the "[u]nbundling of [h]igh-[c]apacity *[t]ransport* [f]acilities,"[15/] the Court cited solely to the sections of the *Triennial Review Order* on transport. *See e.g.*, 359 F.3d at 573-74 (citing paragraphs 359, 372, 381-93, 398, 399-401, 405-09, 412-416, 411, 394, 360 of the *TRO*). In no instance did the Court cite to any section of the *TRO*'s discussion on high capacity loops.

Verizon nonetheless claims that the court defined the term high capacity transport to include high capacity loops. Verizon is wrong. The Court's definition -- "transmission facilities dedicated to a particular customer or carrier" -- is precisely the definition for dedicated transport set forth in the Commission's rules. 47 C.F.R. § 51.319(d)(1)(i) (defining dedicated transport as transmission facilities "dedicated to a particular customer or carrier"). In contrast, the definition for a loop is "a transmission facility between a distribution frame (or its equivalent) in an incumbent LEC central office and the loop demarcation point at an end-user customer premises." *Id.* at § 51.319(a). Contrary to Verizon's contention, the Court's definition of the facilities that it was vacating strongly reinforces the conclusion that the Court intended to vacate only high capacity transport, not also high capacity loops.

Verizon next claims that the Court must have vacated the high capacity loop unbundling requirement because the Commission "ignored both the availability of tariffed special access services" and "facilities-based deployment along similar routes." Verizon *Ex Parte* at 2. This too is wrong. There was no evidence of DS1 deployment along any route. And, although the Court vacated the Commission's conclusion that the availability of special access services was irrelevant to impairment, the Court specifically and only vacated wireless carriers' access to dedicated transport on that ground. 359 F.3d

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14/ Jake E. Jennings Declaration, Attachment 1, ¶ 8 ("Jennings Dec.").

15/ *USTA II*, 359 F.3d at 573 (emphasis added).

at 593 ("We vacate the Commission's decision not to take into account availability of tariffed special access services when conducting the impairment analysis, and we therefore vacate and remand the decision that wireless carriers are impaired without unbundled access to ILEC dedicated transport.") (emphasis added). As set forth in detail below, Verizon has submitted no evidence to demonstrate that special access services are a viable substitute for DS1 UNE loops and EELs used to provide local services to small and medium size businesses. The evidence previously provided in the record of the *TRO* proceeding, as well as the supplemental evidence provided herein, however, plainly demonstrate that special access is not a viable substitute.

Verizon also suggests that the Court's vacatur of state delegation indicates that DS1 loop rules were also vacated. The Court, however, made specific findings as to why, in the absence of the state delegation safety valve, the Commission's national impairment findings for switching and transport could not be sustained. The Court's conclusions where predicated on acknowledgments by the Commission that evidence in the record indicated that there were areas where carriers were not impaired without switching or transport, but the record was insufficiently granular to specifically identify those locations. 359 F.3d at 570-71 (noting the Commission had implicitly conceded that hot cut problems could not support a national impairment finding); *id* at 574 (noting the Commission's acknowledgement that transport alternatives are available in some locations that the Commission's order reflects doubts that a national impairment finding for transport is justified on the record). Were it not for the Commission's own concessions of lack of impairment in certain areas, the Court stated that the deference it normally grants to the Commission's predictive judgment, and recognizing some inevitable over- and under-inclusiveness of unbundling determinations, would have supported the Commission's impairment determinations. *Id* at 570. However, where the evidence indicates that markets vary "decisively," a broad national finding is not sustainable. *Id.*

In contrast to switching and transport,[16/] the Court provides no basis upon which to assume that its vacatur of state delegation rules necessarily swept away the Commission's DS1 loop national impairment findings. No specific findings are announced by the Court as to why the Commission's finding of national impairment for DS1 loops was unsupportable. In fact, the Commission's impairment analysis for DS1 loops was qualitatively different than that for switching, or for transport or higher capacity loops for that matter. *See TRO* ¶ 298 (reciting record evidence of self-deployment of OCn level loops, some evidence of DS3 self-deployment, but "little evidence" of DS1 loops deployment). Unlike switching or loops, there was no record evidence to suggest lack of impairment and the Commission expressed no doubts about the national impairment finding.

The Commission's impairment analysis for loops, and for DS1 loops in particular, rested on record evidence that entry barriers could not be overcome given the limited

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16/ The Court had no opportunity to expressly address the use of DS1 transport solely as a component of the EEL. The Court did, however, sustain the Commission's EELs rules. 359 F.3d at 590-93.

revenue opportunities available from the small and medium-size business customers served by such facilities, and on the complete absence in the record of any evidence of wholesale alternatives. *TRO* ¶ 325. The record evidence demonstrated that there was no market in which DS1 loops could be self-deployed or where those facilities were available on a wholesale basis. In other words, there is no evidence that, for DS1 capacity loops, markets varied decisively. 359 F.3d at 570. The Commission did not even delegate to the states the task of finding areas of self-deployment because there was no evidence self-deployment was feasible anywhere. *TRO* at ¶ 327. At most, the Commission entertained the "suggestion," despite the lack of evidence of wholesale availability, that wholesale alternatives could conceivably exist in some isolated locations or might develop in the future. *Id.* These pronouncements suggest that, at a minimum, a national unbundling rule for DS1 loops might be slightly over-inclusive given the theoretical possibility that some fiber carrier "could" offer wholesale DS1 loops. *Id.* But the possibility of some slight over-inclusiveness does not preclude the Commission from making a national finding, particularly where, as here the market does not vary decisively, 359 F.3d at 570, and it certainly cannot prevent the Commission, on an interim basis, from requiring the continued availability of DS1 facilities to prevent severe market disruption in the overwhelming number of locations where impairment exists.

One final, but important point must be weighed in assessing whether the Court intended to vacate access to high capacity loops. This point is that the Court relied on the continued availability of such facilities to sustain the Commission's rules lifting 251(c)(3) unbundling requirements for hybrid-fiber loops. Among the bases for finding that the Commission could withhold unbundling of hybrid-fiber even in the face "some impairment" was that the availability of loop alternatives "would mitigate any negative impact of local competition in broadband." *USTA II*, 359 F.3d at 580. In identifying those alternatives, the Court cited to paragraph 291 of the *TRO*, which listed alternatives including continued access to DS1 and DS3 loops. *TRO* ¶ 291 ("[I]n addition to subloop unbundling, the availability of TDM-based loops, such as DS1s and DS3s, provide competitive LECs with a range of options for providing broadband capabilities."). The Court held that the Commission acted reasonably in finding that the availability of high capacity loops mitigated the harm of denying unbundled access to hybrid loops even in the face of some impairment. *USTA II*, 359 F.3d at 582 ("With regard to loop alternatives, we agree with the CLECs that these alternatives are not a perfect substitute for the ILECs' hybrid loops, but we understand the Commission to say only that they are a partial substitute; they will mitigate, not eliminate CLEC impairment."). It is inconceivable that the court would sustain hybrid loop rules based in part on the availability of DS1/DS3 loops to mitigate the harm of impairment, yet at the same time remove the ability of CLECs to access those very same facilities.

E. Verizon's July 2 *Ex Parte* Provides No Evidence To Undermine the Commission's Previous Findings of DS1 Impairment

Verizon has recently submitted various filings in the *TRO* docket warning that the Commission cannot adopt interim rules continuing UNE access unless those rules conform with the findings of *USTA II*, and the court's discussion of special access

services in particular. Verizon has further submitted evidence that it claims demonstrate that carriers are using special access services and thus cannot be found to be impaired. As discussed below, Verizon's evidence in no way undermines the Commission's previous findings of DS1 loops impairment or the Commission's reliance on those findings to support a sustainable interim rule on DS1 loop and EEL access.

A careful analysis of Verizon's filing in fact shows that it is fundamentally flawed in two important respects. First, Verizon purports to make showings with respect to an undifferentiated "high capacity" market that fails to distinguish among capacity levels, effectively equating a DS1-based service that provides up to 24 voice-grade channels with optical transmission services that can provide more than 129,000 voice grade channels on a single transmission path.[17/] Second, Verizon either fails to distinguish among the markets or services for which special access services are an input, or, when it does identify specific markets or services that it claims are particularly susceptible to competitive supply, Verizon tellingly omits the key market for which DS1 loops and EELs are used – the small and medium size business market.

1. Demand For DS1 Loops is Not Highly Concentrated

The central underpinning of Verizon's claims that high capacity services are susceptible to competitive supply is that demand for high capacity services is highly concentrated. Verizon July 2 *Ex Parte* at 6. Verizon, however, measures concentration by assessing total billed revenue for all special access services, regardless of capacity or end user market.[18/] Based on this methodology, Verizon states that more than 80 percent of demand in its region is concentrated in 8 percent of its wire centers.

It comes as no surprise that revenues from all special access services are highly concentrated. As Verizon admits in its submission, the vast majority of its special access revenue comes from large enterprise customers or the largest IXCs.[19/] In fact, it is the concentrated nature of aggregate special access revenue that have enabled Bell Companies to qualify for pricing flexibility in many MSAs, despite the absence of competition in most areas of those MSAs. The concentrated nature of high capacity special access service revenue in general, however, does not usefully inform the issue of DS1 impairment. This is because demand for DS1 loops used to provide local service to small and medium size business customers does not correlate with overall levels of special access revenue concentration, as was demonstrated during the *TRO* proceeding.

17/ An OC-192 service provides the equivalent of 5,376 DS-1 circuits, or 129,024 voice grade (DS0) circuits.

18/ Verizon July 2 *Ex Parte*, Verses Declaration ¶ 8 (noting that concentration was measured based on "total billed revenue generated by Verizon's sales of high capacity special access services.").

19/ *See, e.g.*, Verizon's July 2 *Ex Parte* at 22 ("In Verizon's region, large enterprise customers account for more than 85 percent of total special access revenues purchased by end-user business customers.").

NewSouth, for example, demonstrated that its demand for DS1 loops and EELs is anything but concentrated, even in MSAs for which pricing flexibility relief had been granted based on concentration of overall special access revenues. In a January 14, 2003 *Ex Parte* filing in the *TRO* docket, a copy of which as attached, NewSouth demonstrated that, whereas special access revenues may be concentrated in a limited number of wire centers, NewSouth service to customers over DS1 loops and EELs was highly diffuse.[20/] For example, in the Greenville South Carolina MSA, BellSouth obtained pricing flexibility relief based on evidence of at least one fiber-based collocator in the 5 wire centers in that MSA where special access revenue was most concentrated. NewSouth showed, however, that it served customers over DS1 loops not just in those five wire centers, but in an additional 17 wire centers in that same MSA. No fiber-based collocators were present in any of those additional 17 wire centers, at least according to BellSouth's evidence. The same result obtained even in the largest MSAs. In the Atlanta MSA, for example, NewSouth demonstrated that it provided service to customers using DS1 loops in 51 wire centers in that MSA, yet BellSouth's pricing flexibility evidence showed the presence of at least one fiber-based collocator in only 16 of the wire centers in that MSA where special access revenue was most concentrated.

Newsouth's specific factual evidence demonstrated that the demand for DS1 loops and EELs are not correlated to areas of high overall special access revenue. Verizon's generalized assertions of concentrated high capacity demand in no way undermine the specific evidence presented in the *TRO* record on DS1 impairment nor justify a finding on non-impairment for DS1 services.

2. Evidence of Fiber Deployment Does Not Demonstrate Lack of Impairment for DS1 Loops/EELS

Verizon next contends that deployment of "extensive fiber networks" demonstrates that competing providers are able to self-provide high capacity loops. Verizon July 2 *Ex Parte* at 12-13. There is nothing new about carriers deploying fiber. *See TRO* ¶ 298 (noting that record reflects competing carriers "have deployed fiber that enables them to reach customers entirely over their own loop facilities."). Fiber deployment, however, provides no basis to make impairment determinations for DS1 loops, as the Commission previously found. The Commission recognized that when carriers deploy fiber, they do so to provide OCn-level services to large businesses located in buildings that carry a significant portion of competitive traffic in certain MSAs. *Id.* Evidence of fiber deployment led the Commission to conclude that carriers were not impaired without unbundled access to lit OCn loops. *TRO* ¶ 315. In contrast, however, the Commission found that the record "contains little evidence of self-deployment, or availability from alternative providers, for DS1 loops," despite the evidence of fiber deployment. *TRO* ¶ 298. Verizon's July 2 *Ex Parte* on fiber deployment sheds no new

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20/ Letter from Michael H. Pryor, Counsel for NewSouth Communications, to Marlene H. Dortch, Secretary of the FCC, CC Docket Nos. 01-338 and 96-98 (Jan. 14, 2003).

light on the ability of carriers to provide stand-alone DS1 capacity loop facilities small and medium size business customers.[21/]

3. Verizon Special Access Evidence Does Not Undermine the Commission's Previous DS1 Impairment Finding

The primary thrust of Verizon's July 2 *Ex Parte* is to provide purportedly conclusive evidence that carriers are successfully serving customers with special access services and thus have no need to obtain those facilities as UNEs. Verizon makes three main arguments: (1) competing carriers are using high capacity special access services, including DS1 services, more than UNEs; (2) some carriers reportedly use only special access services; and (3) special access services are offered at a discount. Verizon claims that the Commission cannot order the continued availability of any high capacity facilities, even on an interim basis, without taking this evidence into account. None of Verizon's contentions come close to demonstrating that special access is viable substitute for DS1 UNE loops and EELs. They certainly do not preclude the Commission from ordering the continued availability of these facilities pending adoption of final rules based on the Commission's unequivocal DS1 loop impairment finding in the *TRO*. In short, Verizon has provided no evidence for the Commission to take into account with respect to DS1 capacity facilities used in the relevant market.

Initially, it is worth reviewing what the *USTA II* Court said about special access services. Verizon intimates that evidence of special access use automatically equates to a finding of non-impairment. This is not the case. Although the Court held that the Commission erred in not considering special access services when undertaking its impairment analysis, the Court was equally clear that the availability of special access may well be irrelevant to impairment in light of factors such "administrability, risk of ILEC abuse, and the like." *USTA II,* 359 F.3d at 577. As the Court noted, "given the ILECs' incentives to set the tariff price as high as possible and vagaries of determining when that price gets so high that the 'impairment' threshold has been crossed, a rule that allowed ILECs to avoid unbundling requirements by offering a function at lower[sic]-than-TELRIC rates might raise real administrable issues." *Id.* at 576. Thus, a key task for the Commission on remand will be to assess these various factors and determine the extent to which the availability of special access effects impairment. Verizon ignores the factors identified by the Court as relevant to the analysis and seeks to prejudge the outcome of that determination by claiming that evidence of special access use automatically proves non-impairment.

Perhaps more importantly, Verizon fails to provide evidence of the extent to which special access economically can be used in lieu of DS1 loops and EELs to provide service to the small and medium size customers that are the primary target of facilities-

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21/ There is also reason to question the accuracy of Verizon's fiber deployment evidence. For example, Verizon repeatedly identifies NewSouth and/or NuVox as among the CLECs that have deployed fiber in various MSAs. *See* Attachment 8 of the Verizon July 2Ex Parte. In fact, neither NewSouth or NuVox has deployed its own fiber.

based carriers. This failure is critical because it goes to another key point of the *USTA II* Court's discussion of special access services, which is that the FCC must carefully assess the end user market or services for which special access is an input. The Court noted that special access availability may preclude a finding of impairment where the relevant end user market enjoys "robust competition" despite the use of higher-priced special access services. *USTA II*, 359 F.3d at 593.

Verizon provides no market evidence that the relevant end user market for which DS1 loops and EELs are used – small and medium-size businesses -- enjoys "robust competition." In fact, the available evidence demonstrates that the ILECs continue to dominate the provision of service to this market segment.[22/] Moreover, to the extent that competition has gained a foothold in this market, it is because facilities-based carriers have had access to ILEC DS1 facilities at TELRIC-based rates and have not been forced solely to use special access services, as is the case with wireless carriers.

Verizon's proffer that it leases 93 percent of its DS1 loops as special access not UNEs sheds no light on the extent to which special access is a viable substitute for carriers competing in the local market to serve small and medium size business customers. This is because Verizon fails to disaggregate the enduser markets or services for which the DS1 special access loops are used. Verizon apparently lumped together all DS1 special access services, including those used by the major IXCs solely to originate or terminate long distance service or by wireless carriers to reach cell cites (markets and services for which ILECs have refused to provide UNEs) or for any other conceivable market or service that might help its cause. The totals may include Verizon's own long distance and wireless affiliates. Verizon also fails to identify the extent to which its count of DS1 special access loops includes those that carriers have been forced to use special access based on claims that facilities were not available as UNEs or because of the pre-existing onerous usage requirements that often precluded use of UNE EELs. The Commission recognized that the ILECs wielded these constraints to unfairly deprive CLECs of the ability to use UNEs. *See, e.g., TRO* ¶ 633 (ILECs' claim of lack of facilities "readily thwart competitor's ability to obtain access to high-capacity loops"); *TRO* ¶ 596 (EELs usage restrictions were "susceptible to abuse by the incumbent LECs" and "serve as a drag on competitive entry.")[23/] Verizon's aggregated special access DS1 loop statistic thus provides no basis for finding lack of impairment for DS1 UNE loops or EELs used predominately, as the Commission recognized, to provide local services to

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22/ A study prepared by the Small Business Administration found that ILECs hold a 78 percent share of the small business market (defined as companies with less than 500 employees) and CLECs had a 22 percent market share. A Survey of Small Businesses' Telecommunications Use and Spending, S Pociask, March 2004 at ii (noting that CLECs have garnered 22 percent of the small business market, "with the remaining share belonging to incumbent local exchange carriers"). CLEC share of small businesses located in rural areas was only 11 percent. *Id.*

23/ The Commission's efforts to rectify these abuses through new network modification rules and EELs eligibility requirements were sustained in *USTA II*. *USTA II*, 359 F.3d at 577-78 (upholding network modification rules); *id.* 592-93 (upholding new EELs eligibility criteria).

small and medium size business customers. *TRO* n.961. Nor does Verizon's evidence impeach the Commission's specific findings of impairment for DS1 loops in the *TRO*.

Verizon also claims that carriers can use special access by pointing to press statements by Time Warner that it does not rely on UNEs. Verizon provides no evidence of the markets or services for which Time Warner (or other carriers) use special access services as in input. Without such information, the unadorned fact that some carriers use special access in some places for some services provides no basis to imply a generalized lack of impairment for DS1 loops or EELs based on tariffed DS1 special access. In fact, as Time Warner Telecom has informed the Commission, it and other facilities-based competitors "have only been able to compete in small geographic areas and only for customers in certain buildings."[24/] Moreover, Time Warner Telecom has previously warned the Commission that continuing ILEC market power coupled with premature deregulation under the Commission's pricing flexibility regime creates the opportunity for ILECs to engage in precisely the type of abuses that the *USTA II* court recognized may well form the basis for finding that special access availability is irrelevant to impairment.[25/]

Verizon next states that few special access customers pay "base" rates for special access services, but instead utilize Verizon discounts available to customers that enter into term commitments. It claims that it has discounts ranging from 5 to 40 percent, and that, on the whole, customers are purchasing special access services from Verizon at an average of approximately 35 to 40 percent. Verizon, however, fails to make the next logical step, which is to compare those discounted rates to TELRIC rates. As NewSouth has previously demonstrated to the Commission, even discounted term rates for special access vastly exceed TELRIC rates. NewSouth, for example, submitted specific evidence of the price increase that would result from replacing DS1 UNE rates with DS1 special access rates based on two-year or five-year term commitments.[26/] That evidence is summarized in the following chart.

	EEL Rate[27/]	2-Year SPA	5-Year SPA
Asheville NC	$164.58	$348 .00	$310.00
Knoxville	$159.57	$348.00	$310.00

24/ Comments of Time Warner Telecom, *AT&T's Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM 10593, at 4 (filed December 2, 2002) ("Time Warner Comments").

25/ Time Warner Comments at 2 (warning that pricing flexibility empowers ILECs to engage in predatory pricing and the continuing ILEC market power enables them to raise rivals costs through non-price discrimination).

26/ *See* NewSouth Oct.3, 2002 Ex Parte.

27/ Assumed 10 mile interoffice channel.

Savannah	$149.43	$348.00	$310.00

Thus, even after making commitments necessary to qualify for discounts, special access rates remain substantially above UNE rates – certainly high enough to suggest that the "'impairment' threshold has been crossed." *USTA II*, 539 F.3d at 576. NuVox below describes a more recent comparison of special access to UNE pricing that confirms these earlier findings.

Additionally, on remand, the Commission must assess the implications of ILEC special access discount arrangements that, through a combination of discounted pricing, commitment requirements, and termination penalties, work to keep carriers on the ILECs' network, undermining the facilities-based competition that has been the Commission's key goal. Another implication of volume and term arrangements is that, under some tariff arrangements, the deepest discounts apply to carriers that can commit the greatest volume. This naturally tends to favor the largest carriers that use special access for all purposes (not just to compete in the local market) and provides such carriers a price advantage over smaller competitive carriers that seek to compete in the local market but would be required to use special access services at higher prices. TELRIC rates, which are not volume or term sensitive, help level the competitive playing field.

Finally, Verizon identifies several classes of services, customers and facilities in which it claims competition is particularly intense. This is the one time in Verizon's filing where it seeks to disaggregate markets and, tellingly, the one market that is *not* identified is the one served by DS1 loops and EELs, the small and medium size business market. Verizon identifies: (1) large enterprise customers, which it defines as Fortune 1000 companies and large public institutions; (2) wireless and long distance services; and (3) entrance facilities. Verizon does purport to identify a fourth segment that it calls EELs. EELs, however, are not a market, they are, as Verizon states, a combination of loops and transport network elements. Verizon, however, makes no effort separately to identify the end user markets or services used with EELs that is different from its generalized discussion of high capacity services and special access services. Verizon provides no evidence of the extent to which special access services can substitute for DS1 loops and EELs for the small and medium size business market.

F. Special Access Pricing Precludes Effective Competition

In response to Verizon's allegations about special access services, NuVox updated its comparison of special access rates and current UNE rates in a representative sample of MSAs. Jennings Dec. ¶ 11. NuVox then assessed the financial impact of being forced to use special access services. Jennings Dec. ¶ 12. The results are striking. Special access rates, even the heavily discounted rates available under various discount commitment plans reasonably available to NuVox, are substantially higher than TELRIC rates for comparable network components. Moreover, the greatest increase occurred in the mileage or transport component of the circuit, emphasizing the importance of preserving DS1 EELs. NuVox estimates that substituting special access even at

discounted rates, for cost-based DS1 network elements increases NuVox's monthly costs by approximately **[REDACTED]** compared to total monthly revenue of approximately **[REDACTED]** Jennings Dec. ¶ 10. NuVox's specific factual findings belie the generalized and unsupported allegations levied by Verizon.

The table below summarizes the increase in costs to NuVox resulting from having to substitute UNE rates with special access rates in select MSAs. The table compares UNE rates to both month-to-month special access rates and discounted special access rates available under the Bell companies' tariffed discount plans. The monthly cost for DS1 circuits in just the five MSAs analyzed increases by slightly under **[REDACTED]** using month-to-month rates and by more than **[REDACTED]** using discounted term plans.

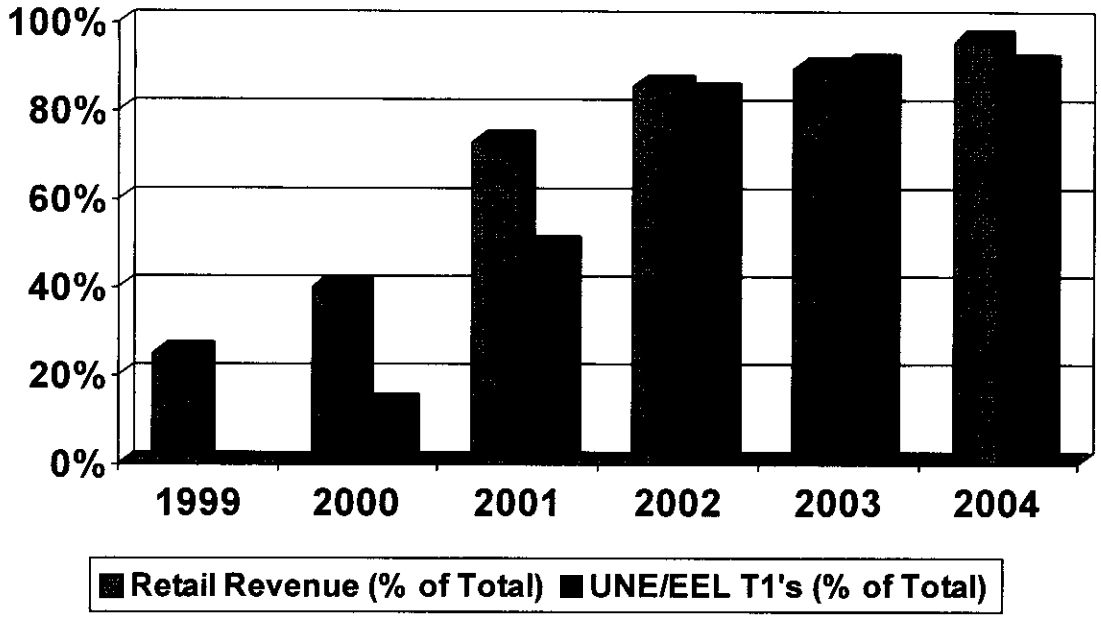
Tables two through four that are attached to the Jennings Declaration provide detailed information on the cost differences between special access and UNE rates on an element-by-element basis. They compare current UNE rates as set forth in existing interconnection agreements with month-to-month and discounted special access rates in the different MSAs. The cost of a ten-mile circuit, approximately the average length of a NuVox EEL, increases substantially, even under discount plans. In Atlanta, for example, the cost increases from $76.74 under UNE rates to $435 under month-to-month rates and $270.65 under BellSouth's discount plan. Jennings Dec., Table 2. In Indianapolis, costs increase from $66 to more $671 on a month-to-month basis or $280 under an Ameritech five-year term commitment discount plan. Jennings Dec., Table 3. Similar increases occur in the other MSAs reviewed.

The tables also highlight that the mileage or transport component of a DS1 circuit increases most dramatically under the Bell companies' special access tariffs. For example, the mileage cost of a ten-mile EEL in Atlanta is $1.15. Jennings Dec., Table 2. Under BellSouth's special access tariff that costs increases to $180.00 on a month-to-month basis, or $80.00 under BellSouth's Area Commitment Plan. *Id.* The same result occurs in other Bell regions. In the Indianapolis MSA, which incorporates two different special access pricing zones, the mileage component cost of a ten-mile EEL increase from $16.50 under UNE pricing to $282.00 under month-to-month in zone 2 and to

$344.00 in zone 4. Under a five-year discount plan, the cost increases to $137.50 or $140.50 in zones 2 and 4 respectively. Jennings Dec., Table 3.

Cost increases of this magnitude cannot be absorbed when serving small and medium size customers, as NuVox does. NuVox has no ability to pass through cost increases of this magnitude by raising the prices it charges small business customers. Jennings Dec. ¶ 10. More than 18,000 of NuVox's 37,000 customers purchase 12 lines or less. Jennings Dec. ¶ 4. Revenues from these customers average between $500 to $700 per month for the entire suite of services NuVox provides. Substituting discounted special access rates for UNE EEL increases the network costs per customer by 53 percent on average. Jennings Dec. ¶ 12. The result is that, for the average customer, NuVox goes from positive to negative EBITDA. The results are depicted in the table below:

The analysis conducted by NuVox belies the generalized assertions made by Verizon about the ability of carriers to substitute special access services for UNEs. As demonstrated above, substituting special access rates is not economically viable for NuVox. Jennings Dec. ¶¶ 10-14. Moreover, unlike Verizon's suggestion that carriers have entered the market using special access, NuVox has been able to enter the local market and compete for small business customers only through the availability of UNEs. Jennings Dec. ¶¶ 5-9. As demonstrated by the graph below, NuVox's ability to generate revenue from end user retail customers (as opposed to revenue from intercarrier compensation) has grown only with the growth of UNEs as a greater percentage of ILEC circuits. Jennings Dec. ¶ 9. In contrast the Verizon's general assertion about percentages of high capacity facilities leased as special access versus UNE, the graph below shows that roughly 90 percent of NuVox's circuits are leased as UNEs. Jennings Dec. ¶ 9. Finally, NuVox became EBIDTA positive in second the quarter of 2002, again only as result of its shift to UNEs. Jennings Dec. ¶ 9. As UNEs as a percentage of leased circuits has grown, so has NuVox's retail revenue as a percentage of overall revenue. Jennings Dec. ¶ 9.



G. The Inability of Add New Customers Will Have Significant Adverse Effects

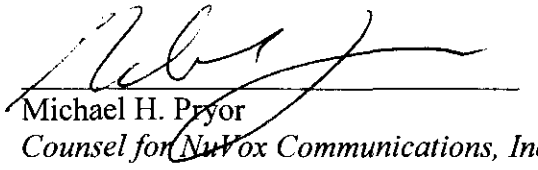
As we understand the Commission's current proposal, if the Commission does not act by the time the "standstill" expires at the end of six months, the Bell companies will at that time have the ability to impose special access pricing on any new customer. The practical effect will be to stop NuVox's growth in its tracks. Jennings Dec. ¶ 13. We expect the same would be true of other carriers as well. NuVox cannot afford to put new customers on special access circuits for some unknown period of time pending the adoption of final rules. *See* Jennings Dec. ¶ 13. Since there is great likelihood that the final rules would once again find impairment, NuVox would have to use month-to-month special access rates, which as demonstrated above are prohibitive. NuVox would use month-to-month because discount plans require long term commitments with penalties for early termination. Thus, if NuVox put customers under term plans, NuVox could not switch customers over to the UNE rates when the final rules came out.

As result, NuVox would simply not add new customers, freezing its growth. Jennings Dec. ¶ 13. At the same time, normal churn leads to loss of customers. Jennings Dec. ¶ 14. Indeed, one could anticipate that churn may increase given the uncertain climate. Jennings Dec. ¶ 14. Churn without the addition of new customers leads to net loses, immediately effecting the bottom line and potentially raising concerns from investors and lenders.[28/]

28/ A number of investors have recently informed the Commission about these concerns. *See* Letter from Peter H. O. Claudy, MC Venture Partners, James Fleming, Columbia Capital,

The consequences of having to freeze growth, losing existing customers, and possibly having to withdraw from certain markets entirely, see Jennings Dec. ¶¶ 10-14 should the Commission not act in a timely manner has forced NuVox, and the entire facilities-based CLEC community to urge the Commission to preserve DS1 loop and EEL access pending the adoption of final rules.

Very truly yours,



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Barry Ohlson, Senior Legal Advisor
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Michelle Carey, Chief
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James N. Perry, Jr., Madison Dearborn Partners, L.L.C., Rand G. Lewis, Centennial Ventures, James H. Greene, Jr., Kohlberg Kravis Roberts & Co., to Michael K. Powell, Chairman of the FCC, CC Docket Nos. 01-338, 96-98, and 98-147 (July 22, 2004); Letter from William Laverack, Jr., Whitney & Co., LLC, Michael Huber, Quadrangle Group, LLC, Anthony J. Bolland, Boston Ventures, to Michael K. Powell, Chairman of the FCC, CC Docket Nos. 01-338, 96-98, and 98-147 (July 28, 2004); Letter from G. Jackson Tankersley, Jr. to Michael K. Powell, Chairman of the FCC, CC Docket Nos. 01-338, 96-98, and 98-147 (July 30, 2004).

Attachment 1

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147

DECLARATION OF JAKE E. JENNINGS ON BEHALF OF NUVOX COMMUNICATIONS

1. I am currently Vice President of Regulatory and Industry Affairs of NuVox Inc., the parent of several operating companies, including NewSouth Communications Corp. doing business as NuVox Communications ("NuVox"). I have been employed by NuVox since October of 2000. In my capacity as Vice President I have had an integral role in preparing, developing, and implementing NewSouth's and now NuVox's business plan, negotiating and implementing interconnection agreements with incumbent local exchange carriers ("ILECs"), and managing intercarrier relations. I have information and knowledge of the data used to conduct the analysis of special access versus unbundled network element ("UNE") pricing and the financial impact of using special access services discussed herein.

2. I am submitting this declaration to explain the effect that requiring NuVox to utilize ILEC special access services instead of DS1 loops and EELs will have on NuVox and

the customers it serves and in response to allegations made by Verizon concerning the ability of carriers to utilize special access services instead of TELRIC-based DS1 loops and enhanced extended loops ("EELs").

A. HOW NUVOX USES ILEC LAST-MILE FACILITIES TO BRING COMPETITIVE CHOICE TO SMALL BUSINESS CUSTOMERS

3. NuVox is a facilities-based competitive carrier in that it has purchased and deployed its own switching equipment. Specifically, NuVox has deployed 28 "voice" switches and 13 data switches. Utilizing this switching equipment, NuVox provides service in both large cities and small towns in 16 states in the Southeast and Midwest. NuVox has also purchased and collocated its own equipment in 281 ILEC switching centers. The NuVox equipment collocated in these switching centers is used to aggregate dialtone from NuVox's individual customers and transport that traffic back to NuVox's switches.

4. NuVox serves approximately 37,000 customers, which overwhelmingly are small to medium-size businesses such as car dealerships, medical offices, real estate offices and law offices. Over 18,000 of NuVox's customers purchase 12 lines or less. NuVox's offerings include local and long distance service as well as broadband data and Internet access services. The revenue from these customers is approximately $500 to $700 per month. NuVox offers high-speed broadband access that the incumbent carrier did not provide. In fact, over 90 percent of NuVox's customers are upgraded from the analog services they received from the incumbent carrier to high-speed digital services when they switch from the incumbent carrier.

B. ACCESS TO UNE DS1 LOOPS AND EELS HAS ENABLED NUVOX TO COMPETE IN THE LOCAL MARKET

5. Although NuVox has deployed much of its own equipment, NuVox requires access to incumbent LEC last-mile facilities in order to reach its customers. NuVox is critically dependent upon ILEC local loops, and loop transport combinations called enhanced extended loops or EELs.

6. NuVox is wholly reliant on these incumbent LEC last mile facilities. No other carrier provides DS1 level loops to buildings and, as the FCC found, it is "economically infeasible" for carriers to build their own DS1 level loops. As the Commission noted, the revenue generated from the small and medium size business customers served by DS1 loops is "not sufficient to make self-deploying DS1 loops economically feasible from a cost recovery perspective." *Triennial Review Order* ¶ 326. This is certainly true for NuVox.

7. NuVox often extends the reach of a DS1 loop by combining it with DS1 level dedicated transport, the so-called EELs. When NuVox uses DS1 dedicated transport as a component of the EEL, that network element is dedicated to a single customer, just as the DS1 loop is dedicated to a single customer. NuVox's ability to recoup the cost of the DS1 EEL is based on the revenue generated from the single customer served by that facility, which is typically a small business. (This distinguishes transport used as a component of an EEL from other higher capacity transport services that are used to carry traffic from many customers.). Thus, the revenue stream that the FCC found insufficient to support DS1 loop self-deployment similarly is insufficient to cover the cost of self-deployment of a DS1 EEL.

8. The availability of DS1 EELs allows competitors to expand their geographic footprint in a cost effective way. EELs expand NuVox's service territory from the 281 wire

centers in which it is currently collocated to 1536 wire centers. Approximately 45 percent of NuVox's customers are served using EELs.

9. It is because of the availability of UNE DS1 loops and EELs that NuVox has been able to enter the local market and provide competitive service to small and medium-size business customers. Indeed, as NuVox has been able to shift its purchase of ILEC facilities from special access to UNEs, NuVox has also shifted the primary source of its revenues from intercarrier compensation to end user, retail revenue. In 1999, only slightly more than 20 percent of NuVox's revenues were derived from end user or retail charges, and all of NuVox's circuits were purchased as special access. As NuVox built out its network, which was completed in the fourth quarter of 2001, NuVox began to shift a greater percentage of its circuits from special access to UNE DS1 loops and EELs. This allowed NuVox to aggressively expand into the small and medium-size business market. In the second quarter of 2002, NuVox became EDITDA positive. By 2003, the revenue picture had completely reversed and more than 80 percent of NuVox's revenues came from retail, end user revenues, and nearly 90 percent of ILEC facilities were purchased as UNEs. The trend of NuVox revenue and UNE use is depicted on the table on Section F of the foregoing letter.

C. REQUIRING CARRIERS TO USE SPECIAL ACCESS SERVICES WILL SUBSTANTIALLY INCREASE NUVOX'S COSTS AND HAMPER THE DEVELOPMENT OF FACILITIES-BASED COMPETITION.

10. Verizon has recently submitted comments to the Commission suggesting that carriers can serve customers, including small business customers, with special access services. Requiring NuVox to use special access services will result in a significant increase in costs. NuVox would have no choice but to pay these higher rates because there are virtually no alternative providers of DS1 level transport or loops, and it simply is not

economically feasible for NuVox to build its own loops and transport. If NuVox has to obtain the same loop and transport facilities (*i.e.*, EELs) as special access services that it currently obtains at state-established, cost-based rates, NuVox's monthly costs would increase by more than **[REDACTED]** To put those cost increases in perspective, NuVox's total monthly revenue is currently approximately **[REDACTED]**. NuVox cannot pass price increases of this magnitude through to its customers. Cost increases of this magnitude will force to withdraw from certain markets altogether. Having to take such actions would also tarnish NuVox's reputation, further undercutting its ability to compete with SBC, BellSouth and other incumbent carriers.

11. To demonstrate the effect of having to use special access services, NuVox compared UNE rates with special access pricing using both month-to-month rates and discount rates reasonably available to NuVox under the FCC special access tariffs filed by BellSouth Telecommunications, Inc. ("BellSouth"), Southwestern Bell Telephone Company ("SWBT")Ameritech Operating Companies ("Ameritech"). The results of this analysis are contained in tables 1-4 attached. NuVox utilized the currently available UNE rates for DS1 loops and DS1 transport under its interconnection agreements with these companies. NuVox then identified special access rates for analogous network elements, including mileage. For tables 2 - 4, NuVox assumed interoffice mileage of ten miles, which is near the average length for NuVox EELs. The totals in table 1 reflect actual increases for circuits currently in operation in the MSAs. NuVox included both base month-to-month rates as well as discount rates for comparison purposes. For BellSouth, NuVox utilized BellSouth Area Commitment Plan (ACP). For SWBT, NuVox utilized the High Capacity Term Payment Plan and for Ameritech it utilized the Optional Payment Plan. Some of the MSAs are ones in which the

Bell Company has received pricing flexibility, as indicated on the tables. The tables identify the relevant Bell company tariff provisions from which the rates were obtained.

12. NuVox also analyzed the financial effect of these cost increases. The chart below demonstrates that using special access increases network costs by 53 percent on average and results in earnings ("EBIDTA") per customer going from positive to negative.

13. Requiring NuVox to use special access for all new customers should the Commission not adopt final rules by the time the "standstill" order expires would stop NuVox growth. NuVox could not afford to serve new customers using ILEC special access services, even for a short (but indeterminate) period of time. Under these circumstances NuVox could not utilize discounted special access rates because NuVox then could not switch those customers to UNEs once the final order was adopted. Thus, NuVox would simply stop adding new customers.

14. Not only would NuVox be precluded from adding new customers, but normal churn would result in a *net loss* of customers each month. Moreover, we reasonably expect that churn would increase given the added uncertainty. The loss of customers coupled with an inability to add new customers would immediately and detrimentally effect NuVox's financial situation. We would expect NuVox's investors and lenders to react negatively to these developments. It is thus imperative that the Commission maintain access to DS1 loops and EELs pending the adoption of final rules.

15. This concludes my declaration.

I declare under penalty of perjury that the foregoing is true and correct. Executed on August 19 2004.

Jake E. Jennings

Tables
1-4

Table 1

REDACTED

Table 2
UNE/EEL vs. Special Access
Atlanta MSA

UNE Density Zone 1, SPA Density Zone 1 MSA Price Flex (Full Relief)

Element	EEL USOCs	EEL Rate	SPA USOCs	SPA MTM	SPA 49 mos.	Tariff	Tariff Ref.
Channel Termination (DS1 Loop)	USLXX	$ 41.02	TMECS	$ 168.00	$ 123.00	FCC #1 BellSouth	23.5.2.9(A)(1)
Mileage @ 10 miles	1L5XX	$ 1.15	1L5XX	$ 180.00	$ 80.00	FCC #1 BellSouth	23.5.2.9(B)(2)
Interoffice Channel Fixed	U1TF1	$ 34.19	1L5XX	$ 85.00	$ 65.00	FCC #1 BellSouth	23.5.2.9(B)(2)
COLO Cross Connect	PE1P1	$ 0.37	PE1P1	$ 2.65	$ 2.65	FCC #1 BellSouth	13.3.23(B)(1)
Total		**$ 76.74**		**$ 435.65**	**$ 270.65**		

Greenville MSA

UNE Density Zone 1, FCC Density Zone 2 MSA Price Flex (Limited Relief)

Element	EEL USOCs	EEL Rate	SPA USOCs	SPA MTM	SPA 49 mos.	Tariff	Tariff Ref.
Channel Termination (DS1 Loop)	USLXX	$ 79.51	TMECS	$ 175.00	$ 123.00	FCC #1 BellSouth	7.5.9(A)(1)
Mileage @ 10 miles	1L5XX	$ 3.42	1L5XX	$ 186.50	$ 54.50	FCC #1 BellSouth	7.5.9(B)(2)
Interoffice Channel Fixed	U1TF1	$ 77.14	1L5XX	$ 80.00	$ 70.00	FCC #1 BellSouth	7.5.9(B)(2)
COLO Cross Connect	PE1P1	$ 1.12	PE1P1	$ 2.65	$ 2.65	FCC #1 BellSouth	13.3.23(B)(1)
Total		**$ 161.19**		**$ 444.15**	**$ 250.15**		

Table 3
UNE/EEL vs. Special Access
Indianapolis MSA

UNE Density Zone 3, SPA Density Zone 2 MSA Price Flex (Limited Relief)

Element	EEL USOCs	EEL Rate	SPA USOCs	SPA MTM	SPA 5-YR	Tariff	Tariff Ref.
Channel Termination (DS1 Loop)	4U1X3	$ 38.48	TZ4X2	$ 280.00	$ 110.00	FCC #2 Ameritech	7.5.9(B)(1)
Mileage @ 10 miles	1YZX3	$ 16.50	1YZX2	$ 282.00	$ 137.50	FCC #2 Ameritech	21.5.2.7(B)(4)
Interoffice Channel Fixed	CZ4X3	$ 11.10	CZ4X2	$ 103.00	$ 26.30	FCC #2 Ameritech	21.5.2.7(B)(3)
COLO Cross Connect	CXCDX	$ 0.36	CXCDX	$ 6.89	$ 6.89	FCC #2 Ameritech	16.5(4)(B)
Total		**$ 66.44**		**$ 671.89**	**$ 280.69**		

Indianapolis MSA

UNE Density Zone 3, SPA Density Zone 4 MSA Price Flex (Limited Relief)

Element	EEL USOCs	EEL Rate	SPA USOCs	SPA MTM	SPA 5-YR	Tariff	Tariff Ref.
Channel Termination (DS1 Loop)	4U1X3	$ 38.48	TZ4X4	$ 353.00	$ 130.00	FCC #2 Ameritech	21.5.2.7(B)(1)
Mileage @ 10 miles	1YZX3	$ 16.50	1YZX4	$ 344.00	$ 140.50	FCC #2 Ameritech	21.5.2.7(B)(4)
Interoffice Channel Fixed	CZ4X3	$ 11.10	CZ4X4	$ 108.00	$ 50.75	FCC #2 Ameritech	21.5.2.7(B)(3)
COLO Cross Connect	CXCDX	$ 0.36	CXCDX	$ 6.89	$ 6.89	FCC #2 Ameritech	16.5(4)(B)
Total		**$ 66.44**		**$ 811.89**	**$ 328.14**		

Table 4
UNE/EEL vs. Special Access
Wichita MSA

UNE Density Zone 3, SPA Density Zone 3 non-MSA Pricing

Element	EEL USOCs	EEL Rate	SPA USOCs	SPA MTM	SPA 5-YR	Tariff	Tariff Ref.
Channel Termination (DS1 Loop)	U4D1X	$ 64.78	TMECS	$ 185.00	$ 102.90	FCC #73 Southwes	7.3.10(F)(10.3)(a)
Mileage @ 10 miles	ULNHS	$ 3.50	1L5XX	$ 155.00	$ 88.50	FCC #73 Southwes	7.3.10(F)(10.3)(b)
Interoffice Channel Fixed	ULNHS	$ 46.86	1L5XX	$ 60.00	$ 34.00	FCC #73 Southwes	7.3.10(F)(10.3)(b)
COLO Cross Connect	UCXHX	$ 7.12	SP1A1	$ 4.64	$ 4.64	FCC #73 Southwes	25.7.5(A)(1)
Total		**$ 122.26**		**$ 404.64**	**$ 230.04**		

St. Louis MSA

UNE Density Zone 1, SPA Density Zone 2 MSA Price Flex (Limited Relief [1])

Element	EEL USOCs	EEL Rate	SPA USOCs	SPA MTM	SPA 5-YR	Tariff	Tariff Ref.
Channel Termination (DS1 Loop)	U4D1X	$ 91.06	TMECS	$ 183.00	$ 95.00	FCC #73 Southwes	7.3.10(F)(10.3)(a)
Mileage @ 10 miles	ULNHS	$ 5.10	1L5XX	$ 170.00	$ 105.00	FCC #73 Southwes	39.5.2.7(B) & 39.5.2.7(N)(2)
Interoffice Channel Fixed	ULNHS	$ 46.85	1L5XX	$ 80.00	$ 37.50	FCC #73 Southwes	39.5.2.7(B) & 39.5.2.7(N)(2)
COLO Cross Connect	UCXHX	$ 14.51	SP1A1	$ 4.64	$ 4.64	FCC #73 Southwes	25.7.5(A)(1)
Total		**$ 157.52**		**$ 437.64**	**$ 242.14**		

St. Louis MSA

UNE Density Zone 1, SPA Density Zone 3 MSA Price Flex (Limited Relief [1])

Element	EEL USOCs	EEL Rate	SPA USOCs	SPA MTM	SPA 5-YR	Tariff	Tariff Ref.
Channel Termination (DS1 Loop)	U4D1X	$ 91.06	TMECS	$ 185.00	$ 102.90	FCC #73 Southwes	7.3.10(F)(10.3)(a)
Mileage @ 10 miles	ULNHS	$ 5.10	1L5XX	$ 180.00	$ 110.00	FCC #73 Southwes	39.5.2.7(B) & 39.5.2.7(N)(2)
Interoffice Channel Fixed	ULNHS	$ 46.85	1L5XX	$ 85.00	$ 40.00	FCC #73 Southwes	39.5.2.7(B) & 39.5.2.7(N)(2)
COLO Cross Connect	UCXHX	$ 14.51	SP1A1	$ 4.64	$ 4.64	FCC #73 Southwes	25.7.5(A)(1)
Total		**$ 157.52**		**$ 454.64**	**$ 257.54**		

Attachment 2

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January 14, 2003

Via Electronic Comment Filing System

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: *Ex Parte Presentation,* CC Docket Nos. 01-338 and 96-98

Dear Ms. Dortch:

NewSouth Communications ("NewSouth"), through its counsel, hereby submits this notice of two *ex parte* meetings held today, January 14, 2003. At the first meeting, Jake E. Jennings, Vice President, Regulatory Affairs, NewSouth, and the undersigned, met with William Maher, Richard Lerner, Thomas Navin, Scott Bergmann, and Jeffrey Carlisle, of the Wireless Bureau. At the second meeting, Jake E. Jennings, Vice President, Regulatory Affairs, NewSouth, and the undersigned, met with Jordan Goldstein, Senior Legal Advisor to Commissioner Michael J. Copps.

The purpose of these meetings was to discuss NewSouth's concerns with adopting a pricing flexibility standard for determining impairment and with adopting usage restrictions, consistent with the attached presentation and comments previously filed.

Pursuant to Section 1.1206(b)(2) of the Commission's rules, this letter is being provided for inclusion in the public record of the above-referenced proceeding. One copy of this letter and the attached presentation will be filed on the Electronic Comment Filing System.

Very truly yours,

/s/ Michael H. Pryor

Michael H. Pryor
Counsel to NewSouth Communications

Enclosure
cc: Jordan Goldstein (without attachment)
William Maher (without attachment)
Richard Lerner (without attachment)
Thomas Navin (without attachment)
Scott Bergmann (without attachment)
Jeffrey Carlisle (without attachment)
Jake E. Jennings

WDC 325567v1

Triennial Review

Ex Parte Presentation

A Pricing Flexibility Trigger Masks the Significant Impairment that Carriers Like NewSouth Face Without Access to Unbundled Transport and EELs.

- BOCs typically obtain pricing flexibility under the revenue-based portion of the test. As a result, BOCs may obtain pricing flexibility relief for MSAs in which the vast majority of wire centers have no competitive collocated carriers at all.
- In the BellSouth territory, where NewSouth operates, BellSouth has sought and obtained pricing flexibility based on extremely limited showings of competitive entry.

Table 1
Extent of Competitive Entry in BellSouth MSAs

MSA	Total BellSouth WCs	WCs w/ Collocators	Collocators With Non-BellSouth Entrance Facilities in the MSA	Number of B.S. WCs w/4 or more Collocators[1/]
Evansville	4	1	1	0
Lexington	7	1	1	0
Kentucky Outside MSAs	130	3	3	0
Owensboro	9	1	1	0
Clarksville	12	2	2	0
N. Carolina Outside MSAs	57	5	8	1

1/ NewSouth concurs in the view that dedicated transport should not be unbundled in any wire center that does not have at least four alternative carriers capable of providing service from that wire center to the required destination). *See, e.g.*, Allegiance Reply Comments at 18-24 (explaining that the presence of at least four non-ILEC providers substantially lessens the threat of anticompetitive conduct); WorldCom Reply Comments at 126-27 (explaining the need to have at least four alternative carriers providing transport from a wire center before eliminating unbundled transport).

NewSouth communications

Even in Major Urban MSAs, Competitive Entry by Carriers with their Own Transport Is Concentrated.

Table 1A
Extent of Competitive Entry in Major Urban BellSouth MSAs

MSA	Total BellSouth WCs	WCs w/ Collocators	Collocators With Non-BellSouth Entrance Facilities in the MSA	Number of B.S. WCs w/4 or more Collocators
Atlanta, GA	58	16	69	9
Charlotte, NC	22	12	46	5
Greensboro, NC	17	7	20	3
Nashville, TN	41	16	33	1
New Orleans, LA	28	6	14	1
Orlando, FL	10	7	39	6

NewSouth communications

Competitive Carriers Serve Customers Subtending Many Wire Centers, Not Just Those Generating the Most Special Access Revenue

- The BOCs contend that the lack of collocators in the majority of wire centers is not important because CLECs concentrate in the wire centers with the most special access revenues.

- As demonstrated in the following tables, this is simply not the case, at least not for NewSouth. NewSouth serves customers subtending a large number of wire centers in an MSA.

- The vast majority of these wire centers have no alternative transport providers, based on the evidence submitted in BellSouth's pricing flexibility petitions.

NewSouth communications

Table 2
Greenville, South Carolina MSA

MSA	Wire Center (WC) CLLI	WC Name	Collocators with Non BellSouth Entrance Facilities (EF)	NewSouth Leased DS-1 Loops*
			No.	
Greenville-Spartanburg, SC	SPBGSCMA	SPBG MAIN	2	Yes
Greenville-Spartanburg, SC	GNVLSCDT	GREENVILLE D&T	1	Yes
Greenville-Spartanburg, SC	GNVLSCWR	GNVL WOODRUFF RD	1	Yes
Greenville-Spartanburg, SC	LYMNSCES	LYMAN MAIN	1	Yes
Greenville-Spartanburg, SC	SPBGSCWV	SPBG WESTVIEW	1	Yes
Greenville-Spartanburg, SC	BLRGSCMA	BLUE RIDGE MAIN	0	Yes
Greenville-Spartanburg, SC	CENTSCWS	CENTRAL MAIN	0	Yes
Greenville-Spartanburg, SC	CLSNSCMA	CLEMSON MAIN	0	Yes
Greenville-Spartanburg, SC	ESLYSCMA	EASLEY MAIN	0	Yes
Greenville-Spartanburg, SC	FNVLSCMA	SPBG FINGERVILLE	0	No
Greenville-Spartanburg, SC	GNVLSCBE	GNVL BEREA	0	Yes
Greenville-Spartanburg, SC	GNVLSCCH	GNVL CHURCHILL	0	Yes
Greenville-Spartanburg, SC	GNVLSCCR	GNVL CRESTWOOD	0	Yes
Greenville-Spartanburg, SC	GNVLSCWE	GNVL WEST	0	Yes
Greenville-Spartanburg, SC	GNVLSCWP	GNVL WARE PLACE	0	Yes
Greenville-Spartanburg, SC	GRERSCMA	GREER MAIN	0	Yes
Greenville-Spartanburg, SC	LBRTSCMA	LIBERTY MAIN	0	Yes
Greenville-Spartanburg, SC	LYMNSCIP	LYMAN IND PARK	0	Yes
Greenville-Spartanburg, SC	MRTTSCMA	TRRS SLATER MARIETTA	0	Yes
Greenville-Spartanburg, SC	PCKNSCES	PICKENS MAIN	0	Yes
Greenville-Spartanburg, SC	SPBGSCBS	SPBG BOILING SPRINGS	0	Yes
Greenville-Spartanburg, SC	SPBGSCCV	SPBG CONVERSE	0	Yes
Greenville-Spartanburg, SC	SXMLSCMA	SIX MILE MAIN	0	No
Greenville-Spartanburg, SC	TRRSSCMA	TRAVELERS REST MAIN	0	Yes

* NewSouth is collocated in two of the wire centers.